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# Supreme Court of the United States

NO. 523

ANTHONY ALBANESE, *Petitioner*

v.

N. V. NEDERL. AMERIK STOOMV. MAATS,
*Respondent*

v.

INTERNATIONAL TERMINAL OPERATING CO.,
INC., *Co-Petitioner*

## AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

**American Trial Lawyers Association**
**Admiralty Section**

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## AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

**American Trial Lawyers Association**
**Admiralty Section**

## STATEMENT OF INTEREST OF THE AMICUS CURIAE

Arthur J. Mandell of Mandell & Wright, Houston, Texas, a member of the bar in this Court, on behalf of the American Trial Lawyers Association, respectfully petitions this Court for leave to file a brief Amicus Curiae on behalf of Petitioner herein, and if granted, for this Honorable Court to consider the arguments and cases in point following this Statement of Interest.

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers,

primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors in admiralty who specialize in maritime tort law, and particularly as it relates to maritime workers covered by the Longshoremen's & Harbor Workers' Act, 33 U.S.C., Sec. 901, et seq., as amended. These maritime workers, engaged as they are in an extremely hazardous industry, have a real and direct interest in the outcome of this appeal.

Said Association is vitally concerned in the final outcome of this case, involving as it does what had been thought to be, until now, two well established principles of law (a) that a shipowner owes a Sieracki seaman, i.e. a longshoreman, an absolute and non-delegable duty to supply him a safe place in which to work, and (b) that The Safety and Health Regulations for Longshoring, promulgated by the Secretary of Labor pursuant to Public Law 85-742, 72 Stat. 835, 33 U.S.C.A. Sec. 941, et seq, in force and effect at the time the injuries to the present petitioner occurred, established an accepted standard of safety binding on the shipowners as well as the stevedores.

The resolution of these two questions are of paramount importance to hundreds of thousands of harbor workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this Brief Amicus Curiæ.

ARTHUR J. MANDELL,
of MANDELL & WRIGHT
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## BRIEF OF AMICUS CURIAE AMERICAN TRIAL LAWYERS ASSOCIATION

### STATEMENT

The American Trial Lawyers Association views the questions presented by the Petitioner in his application for Writ of Certorari as extremely important since the answers will affect thousands of workers engaged in loading and discharging vessels throughout the United States, the admiralty bar, and the maritime industry generally. The holding by the Court of Appeals in this case that the provisions of the "Safety and Health Regulations for Longshoring," as promulgated by the Secretary of Labor do not establish generally accepted standards of safety binding on the shipowner and stevedore alike, represents a direct threat to the safety of those engaged in this type of work and therefore should be dealt with by this Honorable Court.

## QUESTIONS PRESENTED

**I. Does a shipowner have a non-delegable obligation to provide longshoremen with a safe place in which to work as well as a related duty to discover and correct unsafe work factors?**

**II. Are the Safety and Health Regulations for Longshoring, (29 C.F.R., Sec. 9.1, et seq.) relevant on the issues of unseaworthiness and negligence in a suit by a longshoreman against a shipowner?**

## STATEMENT OF THE CASE

For the sake of brevity we adopt Petitioner Albanese's Statement of the Case as it appears on Pages 5-9 of its Application for Writ of Certiorari.

The decision for which review is here respectfully prayed has (a) departed from and tends to erode the established principles of law that a shipowner has an absolute and non-delegable duty to supply longshoremen, "pro hoc vice" seamen, a safe place in which to work, and the related duty to inspect, discover and correct unsafe conditions, and (b) rejected the applicability of the Safety and Health Regulations of Longshoring, promulgated by the Secretary of Labor pursuant to Public Law 85-742, 72 Stat. 835, 33 U.S.C.A. Sec. 941, et seq., as a standard of conduct which if violated constitutes negligence as well as unseaworthiness.

The decision of the Court of Appeals requiring, as a condition precedent to liability, that the evidence must affirmatively show that the shipowner knew of the condition so relaxes the non-delegable duty to supply a safe place in which to work as to make it wholly inoperative.

The non-delegable duty to supply a safe place to work encompasses the duty to inspect and to determine the conditions under which this group of workers are required to discharge their duty. The court, therefore, in charging the jury:

> "And apart from the actual notice you may find a condition which rendered the hold an unsafe area *and existed for sufficient time to charge the defendant with constructive notice* . . . the shipowner had a duty to the plaintiff to remedy those defects of which it knew or in the exercise of reasonable care should have known . . ." (Vol. 1, App. to Def.-Appellant's brief, p. 16a) (Emphasis ours).

correctly stated the applicable law.

A non-delegable duty to supply a safe place to work without the related duty to inspect and determine whether the area is safe for such purpose is restrictive of its non-delegable aspect. Under the charge as given by the Court the jury, even under disputed facts, was the sole arbiter to resolve such dispute.

This court has repeatedly expressed its determination that if the facts justify the reasonable inference that the shipowner's negligence played any part, "even the slightest," in producing Plaintiff's injuries, the issue remains for the jury. *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 523; *Rogers v. Missouri Pacific R.R. Co.,* 352 U.S. 500; and followed in many cases, including *Ammar v. American Export Lines, Inc.,* 326 F.2d 955; *U.S.F.&G. v. U.S.A.,* 152 F.2d 46, 49; *Gallick v. B.&O. R. Co.,* 372 U.S. 108.

It is clear that Respondent knew or in the exercise of reasonable care, should have known that hi-los were intro-

duced in the partially covered hatch, and that under such circumstances blowers would be necessary. The blowers were in the exclusive control of the vessel. The failure to use them rendered the hatch an unsafe place to work, i.e., negligence, as well as unseaworthiness. For the foregoing reasons it is respectfully submitted that the opinion and decision of the Court of Appeals be reversed and the jury verdict be reinstated in full.

The Safety and Health Regulations for Longshoring (29 C.F.R., Sec. 9.1, et seq.).

By enactment of Public Law 85-742, 72 Stat. 835, 33 U.S.C.A. 941, et seq., Congress expressed its grave concern of the human toll taken by the hazardous occupation of longshoring.[1] It, therefore directed and empowered the Secretary of Labor to provide for the establishment of an effective safety program in this hazardous occupation.

Prior to the enactment of Title 33, U.S.C.A., Sec. 941, and the promulgations of the regulations thereunder, what constituted negligence or unseaworthiness was to be determined by the jury under the definitions laid down by the Court. The regulations cast no new duty upon the shipowner; neither do they relieve him of any pre-existing duty. With respect to longshoring, the statutory law of the United States, by enactment hereinabove referred to now codifies definite minimum standards. The failure to comply with and meet these standards creates an unsafe place to work. Since the duty to supply a safe place to work is a personal

[1] The House Report accompanying the 1958 Amendment to the Longshoremen's and Harbor Workers' Compensation Act points out that stevedoring is the most hazardous of all industries which report their experience to the Bureau of Labor Statistics, having an injury frequency rate seven times that of manufacturing. (1958 U.S. Code and Cong. News, p. 3843. Sec. 41 of the Act, [33 USCA, Sec. 941 (a)])

duty resting upon the shipowner of which he cannot rid himself by contract or otherwise, he is duty bound to inspect for unsafe conditions, to discover them, and then to remedy them.

Respondent's argument, in the district court and appellate court, that the standards imposed by the Secretary of Labor are entitled to no evidential value (accepted by the trial court and the court of appeals) because the regulations declare that they are not intended to place any additional responsibilities or duties on the shipowner or to relieve them of responsibilities or duties now placed on them by law, has only superficial plausibility, and does not, with all due deference, withstand analysis. These regulations cast upon the shipowner no new duty, nor do they relieve him of any pre-existing duty; now, as before the regulations were promulgated, it is incumbent upon the shipowner to discharge his non-delegable duty to supply a safe place in which to work. Now, as before, if the area where longshoremen are working, becomes an unsafe place to work, be it through the act of the stevedoring contractor or anyone else, if this condition is the cause of an injury, the shipowner is liable. This was the law before the promulgation of the rules, and it is the law now. All the regulations do is define how this well-established duty shall be discharged in particular circumstances by the stevedores who has undertaken to perform the shipowner's non-delegable duty. *Rule 9.93 describes a minimum standard of safety—not a new duty.*[2] There is nothing in the regulation that forbids it being mentioned to the jury. In fact, what possible use would a safety regulation be if its admonition is withdrawn by suppressing knowledge of it from the trier of the facts? How can it be determined whether a condi-

[2] Appendix A. Pet. Application for Writ.

tion complained of meets a standard of safety if the jury is kept in the dark as to what that standard is? To convert the provision which disavows an intent to add to or diminish the owner's duty into a direction to keep the safety provisions secret is to make the entire regulations ineffective and meaningless. *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963). The decision in the Fourth Circuit in Provenza has been cited with approval by many courts.

*Marshall v. Isthmian Lines, Inc.*, 334 F.2d 133 (5th Cir. 1964), involved an alleged violation of certain Coast Guard regulation pertaining to the stowage of hazardous cargo which were designed to minimize the chance of fire. The court held that the regulation was relevant and the jury should have been made aware of it by introducing it in evidence, and through the court's charge. Apparently because the regulation did not specifically refer to a regulation to provide safety for longshoremen, the court concluded that the violation did not constitute negligence per se; nevertheless the court pointed out that, in a flagrant breach of such regulation, a different standard may apply, and the rule set out in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958) may well be followed. Numerous district courts have reached substantially similar conclusions: See *Skipper v. Amerind Shipping Corp.*, 230 F.Supp. 253 (E.D. La. 1964); *United States v. Grace Line, Inc.*, 221 F.Supp. 339, 9 S.D. N.Y. 1963); *Ray v. Compania Naviera Continental S.A.*, 203 F.Supp. 206 (D. Md. 1962). See also *McHoney v. Marine Navigation Co.*, 233 F.2d 769 (4th Cir. 1956); *Merritt-Chapman & Scott Corp. v. Cornell Steamship Co.*, 265 F.2d 537 (2nd Cir. 1957); *Andros Shipping Co. v. Panama Canal Co.*, 184 F.Supp. 246, 258 (Dist. of Canal Zone, 1960).

The Second Circuit's determination that a shipowner is not under a continuing duty to provide longshoremen with a safe place to work is directly contrary to the holding of the Third Circuit in *Hroncich v. American President Lines, Ltd.*, 334 F.2d 282 (3rd Cir. 1964); the same court's decision in *Ferrante v. Swedish American Line*, 331 F.2d 571 (3rd Cir. 1964); the Fourth Circuit's decision in *Scott v. Isbrandtfen Co.*, 327 F.2d 113 (4th Cir. 1964); the Ninth Circuit's decision in *Aldridge v. States Marine Corp.*, 265 F.2d 554 (9th Cir. 1959); and numerous district court decisions. See, e.g., *Dainer v. SS Longview Victory*, 226 F.Supp. 912 (E.D. Va. 1964).

The appellate court here, notwithstanding this court's decision in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), has nevertheless placed emphasis on the lack-of-control theory on the part of the shipowner in so far as the work of the longshoremen are concerned. This court and many appellate courts have rejected the lack-of-control theory as in Gutierrez, supra, *Peterson v. Alaska Steamship Co.*, 205 F.2d 487, affirmed 347 U.S. 396, and others. Neither can a shipowner contract away its obligation to provide a safe place to work. *Dixon v. United States*, 219 F.2d 10.

## CONCLUSION

The wide departure by the appellate court from the standards of safety approved by this Court, the great concern expressed by the courts and Congress, for the safety of these workers in such hazardous industry, and the danger of erosion of these established principles which the decision presented here for review may engender, presents compelling reasons for this court to settle the law, both on the use of the Safety Regulations as a standard of care, and on the doctrine of negligence in maritime cases, so

that the bar, the industry and those working in the industry will have a clear concept of the applicable law.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION

By A. J. Mandell
*Arthur J. Mandell,*
*Attorney for Amicus Curiae*

DATED AT Houston, Texas, this the 9th day of September, 1965.

## CERTIFICATE

This is to certify that on the 9th day of September, 1965, copies of the above Application to Appear as Amicus Curiae and Brief in support thereof have been forwarded to:

Robert Klonsky and Philip F. DiCostanzo of DiConstanzo, Klonsky & Sergi, Attorneys for Anthony Albanese, Petitioner, whose consent to file this Application has been obtained, at their office and Post Office address: 66 Court Street, Brooklyn, New York 11201;

Edmund F. Lamb and William E. Fay III, of Purdy, Lamb & Catoggio, Counsel to Schaffner and Furey, Attorneys for N. V. Nederl. Amerik Stoomv. Maats, Respondent, at their office and Post Office address: 80 Broad Street, New York, New York 10004; and to

Sidney A. Schwartz and Joseph Arthur Cohen of Alexander, Ash & Schwartz, Attorneys for International Terminal Operating Co., Inc., Respondent, at their office and Post Office address: 76 Beaver Street, New York, New York 10005.

A. J. Mandell
Arthur J. Mandell

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